No. 19-7

In The Supreme Court of the United States

SEILA LAW LLC,

Petitioner,

v.

CONSUMER FINANCIAL PROTECTION BUREAU,

Respondent.

On Writ of Certiorari
To the United States Court of Appeals
For the Ninth Circuit

BRIEF OF *AMICI CURIAE* U.S. SENATORS SHELDON WHITEHOUSE, RICHARD BLUMENTHAL, AND MAZIE HIRONO IN SUPPORT OF COURT-APPOINTED *AMICUS CURIAE*

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INTEREST OF AMICI CURIAE[1]

Amici Curiae are United States Senators Sheldon Whitehouse of Rhode Island, Richard Blumenthal of Connecticut, and Mazie Hirono of Hawaii. *Amici* share with the Court a strong interest in preserving the separation of powers, while preventing corrupting influences from undermining our democracy.

SUMMARY OF ARGUMENT

From cleaner air and water, to safer drugs, to stronger competition and a stable economy, the successes of our nation's century-old regulatory enterprise abound. That regulatory enterprise has protected the public and allowed business to thrive. From the earliest days of administrative regulation of trolley and railroad monopolies, the American economy grew to become, and to this day remains, the world leader.

The conspicuous failures of regulation have usually resulted from industry promoting its preference to remain *un*-regulated by capturing or dominating its regulators. This is true of the 1999 Olympic Pipeline explosion, the disastrous 2010 Deepwater Horizon oil spill, and—notably—the mortgage-industry meltdown of 2008 that led to the

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[1] The parties have consented to the filing of this brief. Pursuant to Rule 37.6, no counsel for any party authored this brief in any part, and no person or entity other than *amici* or *amici*'s counsel made a monetary contribution to fund its preparation or submission.

creation of the Consumer Financial Protection Bureau ("CFPB").

Concerns about such corrupting influences—and about protecting the regulatory decision-maker from them—were central to Congress's creation of the independent, single-director CFPB. This critical anti-corruption interest is one that we, as members of Congress, see in stark relief and seek to address here.

ARGUMENT

I. Congress Sought To Immunize The CFPB From The Very Influences That Now Seek To Undermine Nearly A Century Of Administrative Law.

In the more than eighty years since this Court unanimously decided *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), the Legislative, Executive, and Judicial branches have worked together to preserve the integrity of our regulatory system. Nearly a century of inter-branch cooperation has produced a vast body of administrative and constitutional law that Congress relied on in creating the CFPB. Congress's authority to establish independent regulatory agencies—especially in the financial sphere—is essential both to our democracy and to our complex modern economy, and has long been sanctioned by this Court.

The efficiency, expertise, and relative independence of administrative agencies allows our government to function. There simply are not enough hours on the House or Senate calendars to address

the multiplicity and variety of issues that come before America's regulatory agencies. Congress, moreover, lacks the expertise necessary to address the complex and often technical questions raised in the day-to-day of modern government administration.[2] And particularly in the wake of this Court's decision in *Citizens United*,[3] Congress is increasingly susceptible to the outsize influence of industries that have a demonstrated ability to impede, virtually at will, legislative action—even legislative action that garners overwhelming public support.[4] Whether it is the firearms industry

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[2] *See, e.g.*, Cass R. Sunstein & Adrian Vermuele, *The Unbearable Rightness of Auer*, 84 UNIV. CHI. L. REV. 297, 321 (2016) ("In the absence of a clear congressional direction, courts have assumed that because of their specialized competence, and their greater accountability, agencies are in a better position [than courts] to decide on the meaning of ambiguous terms. That assumption is correct.").

[3] *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010); *see* Richard L. Hasen, *The Decade of* Citizens United, SLATE (Dec. 19, 2019) (noting "we saw $338 million in outside spending in the pre-*Citizens United* 2008 election, compared with more than $1 billion in 2012 and $1.14 billion in 2016" and that "Koch Industries" leads the list of "1,185 corporations that gave money to super PACs in the 2018 election cycle"). It is obvious that the power to spend unlimited money in politics advantages those with unlimited money to spend and a motive to spend it in politics. We saw this new power bring an instantaneous end to Senate bipartisanship on climate change legislation, for instance.

[4] *See, e.g.*, Frank Newport, *Americans Want Government to Do More on Environment*, GALLUP NEWS (Mar. 29, 2018) ("Proposals to reduce emissions, enforce environmental regulations, regulate fracking, spend government money on alternative energy sources and pass a carbon tax all receive majority approval—in some instances above 70%."); QUINNIPIAC

preventing regulation of weapons used in mass killings, or the fossil fuel industry opposing greenhouse gas regulation, or the pharmaceutical industry shielding its high drug prices, these powerful influencers systematically undermine the relationship between the government and the people it represents.

The independence of certain regulatory agencies accordingly allows them to fulfill their statutory missions free from improper intrusion. "Independent agencies serve a critical role in regulating businesses and marketplaces because they are able to enact reasonable business regulations without political interference or the undue influence of corporate interests."[5] For its part, the independent CFPB has held predatory financial companies accountable and protected consumers from unfair, deceptive, and fraudulent practices. As of January 2017, the agency had recovered upwards of $11.8 billion on behalf of some 29 million consumers, including vulnerable populations like students and servicemembers.[6]

UNIV. POLL, VOTERS SUPPORT GUN BACKGROUND CHECKS 94-5 PERCENT (June 28, 2017) (finding 94% support among Americans for universal background checks, with over 90% support from every listed group); ASHLEY KIRZINGER ET AL., KAISER HEALTH TRACKING POLL – LATE APRIL 2017: THE FUTURE OF THE ACA AND HEALTH CARE & THE BUDGET (Apr. 26, 2017) ("[T]he vast majority favor[] allowing the federal government to negotiate with drug companies to get a lower price on medications for people on Medicare (92 percent) . . . .").

[5] Brianne Gorod, *Symposium: Why* Kisor *Is a Case to Watch*, SCOTUS BLOG (Jan. 31, 2019).

[6] *See* Lucinda Shen, *Donald Trump is Targeting an Agency That Has Recovered $11.8 Billion for Consumers*, FORTUNE

Notwithstanding the many successes of the American regulatory framework, over the years, the "insidious phenomenon" of "regulatory capture"—"whereby private industries co-opt government power for their own competitive benefit"—has too often "produced a captured economy that serves the well-off at the expense of the general welfare."[7] It is a proper task of Congress to fend off that "insidious phenomenon"; particularly so in this case, as the devastating effects of this dynamic were never more apparent than in the financial crisis of 2008. As the congressionally appointed Financial Crisis Inquiry Commission concluded:

> [T]he financial industry itself played a key role in weakening regulatory constraints on institutions, markets, and products. It did not surprise the Commission that an industry of such wealth and power would exert pressure on policy makers and regulators. From 1998 to 2008, the financial sector expended $2.7 billion in reported federal lobbying expenses; individuals and political action committees in the sector made more than $1 billion in campaign contributions. What troubled us was the extent to which the nation was deprived

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(Jan. 27, 2017); CONSUMER FINANCIAL PROTECTION BUREAU, THE OFFICE OF SERVICEMEMBER AFFAIRS: CHARTING OUR COURSE THROUGH THE MILITARY LIFECYCLE (May 2017).

[7] BRINK LINDSEY & STEVEN M. TELES, THE CAPTURED ECONOMY: HOW THE POWERFUL ENRICH THEMSELVES, SLOW DOWN GROWTH, AND INCREASE INEQUALITY 5 (2017).

> of the necessary strength and independence of the oversight necessary to safeguard financial stability.[8]

It was against this backdrop of nefarious influence that Congress designed the CFPB. The independence of the resulting agency was hardly without precedent. Indeed, "[c]ongressional alertness to the distinctive danger of political interference with financial affairs . . . began the longstanding tradition of affording some independence to the government's financial functions." *PHH Corp. v. Consumer Fin. Prot. Bureau*, 881 F.3d 75, 91 (D.C. Cir. 2018). Our forebears long recognized and sought to guard against the co-opting and corrupting tendencies of powerful private interests.[9] To that end, "[f]rom nearly the beginning of the United States, Congresses—including the First Congress, staffed by many drafters of the Constitution—have created financial regulators shielded from presidential direction."[10] In those early days after the founding,

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[8] FIN. CRISIS INQUIRY COMM'N, THE FINANCIAL CRISIS INQUIRY REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON THE CAUSES OF THE FINANCIAL AND ECONOMIC CRISIS IN THE UNITED STATES xviii (2011).

[9] So, too, has this Court. *See, e.g.*, *Standard Oil Co. of New Jersey v. Lee*, 221 U.S. 1, 83 (1901) (Harlan, J., concurring in part and dissenting in part) (noting that in 1890, "the conviction was universal that the country was in real danger from another kind of slavery . . . that would result from aggregations of capital in the hands of a few individuals and corporations controlling, for their own profit and advantage exclusively, the entire business of the country").

[10] Brief of *Amici Curiae* CFPB Separation of Powers Scholars, *Consumer Financial Protection Bureau v. All American Check Cashing, Inc.*, No. 18-60302 (5th Cir.

"[t]he notion that any of this was unconstitutional was barely discernable[.]"[11] And this Court, from *Humphrey's Executor* through *Morrison v. Olson*, 487 U.S. 654 (1988), has consistently reaffirmed Congress's authority to establish agencies insulated from corrupting private influence and political interference.[12]

As elected members of Congress, we are deeply attuned to this anti-corruption concern. Protecting the integrity of these agencies from corporate and special-interest corruption is of vital importance given the elemental tension we see between two classes of constituents in our democracy: an influencer class, which occupies itself with aggregating power and favor-seeking from government, and the general population, which

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2018), at 7 (documenting the significant discretion and structural independence afforded the Department of Treasury and its Office of the Comptroller, and First Bank of the United States). Indeed, "James Madison, the greatest of the Framers, believed that the Comptroller of the Currency would not be under the President's hierarchical control; because the Comptroller settled legal claims, his office contained 'too much of the Judicial capacity to be blended with the Executive' and subject to the President's plenary power." Cass R. Sunstein, *Myth of the Unitary Executive, The Docket: Proceedings from the Administrative Conference of the United States*, 7 ADMIN. L. REV. 299, 303-04 (1993).

[11] Sunstein, *supra* note 10, at 304.

[12] Even this Court's most full-throated endorsement of executive power in this context recognized that there "may be [agency] duties . . . the discharge of which the President cannot in a particular case properly influence or control." *Myers v. United States*, 272 U.S. 52, 135 (1926).

merely wants a government that will not readily yield to the influencers.[13]

The influencer class uses corrupt and often-surreptitious means to undermine democratic accountability to the general public. "Influences secretly urged under false and covert pretenses must necessarily operate deleteriously," subjecting "government[] to the to the combined capital of wealthy corporations, and produc[ing] universal corruption[.]"[14] The consequences are dire. "Corruption breaks the constitutionally necessary 'chain of communication' between the people and their representatives. . . . Where enough money calls the tune, the general public will not be heard." *McCutcheon v. Fed. Elec. Comm'n*, 572 U.S. 185, 327

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[13] *See* Theodore Roosevelt, The New Nationalism, Speech at Osawatomie, Kansas (Aug. 31, 1910), *reprinted in* THEODORE ROOSEVELT, 3 THE NEW NATIONALISM 17 (1910) ("The absence of effective State, and especially, national, restraint upon unfair money-getting has tended to create a small class of enormously wealthy and economically powerful men, whose chief object is to hold and increase their power."); Andrew Jackson, Veto Message Regarding the Bank of the United States (July 10, 1832), *in* 2 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 1789-1897, at 576, 590 (James D. Richardson ed., Washington Gov't Printing Office 1896) ("It is to be regretted that the rich and powerful too often bend the acts of government to their selfish purposes . . . to make the rich richer and the potent more powerful, the humble members of society . . . have neither the time nor the means of securing like favors to themselves, have a right to complain of the injustice of their government.").

[14] *Marshall v. Baltimore & Ohio Railroad Co.*, 57 U.S. 314, 335 (1853), *overruled by statute on other grounds*, 72 Stat. 415 (codified at 28 U.S.C. § 1332(c)).

(2014) (Breyer, J., dissenting). Justice Breyer's concern is worsened when the tune is called from behind masks of anonymity.[15]

Opponents of independent agencies argue that they are "ever-growing" and "unaccountable."[16] Well, of course agencies grow, as the economy grows and becomes more complex;[17] but they are hardly unaccountable. Every agency, independent or otherwise, is subject to substantive oversight by Congress and procedural oversight by the judiciary. Where an agency departs from Congress's policy, Congress can and does step in.[18] Where an agency

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[15] *See also John Doe No. 1 v. Reed*, 561 U.S. 186, 228 (2010) (Scalia, J., concurring in the judgment) ("Requiring people to stand up in public for their political acts fosters civic courage, without which democracy is doomed. For my part, I do not look forward to a society which, thanks to the Supreme Court, campaigns anonymously . . . hidden from public scrutiny and protected from the accountability of criticism. This does not resemble the Home of the Brave.").

[16] Robert Barnes & Steven Mufson, *White House Counts on Kavanaugh in Battle Against 'Administrative State'*, WASH. POST (Aug. 12, 2018).

[17] It is hard to imagine that regulatory efforts would *not* "grow" to address modern aviation, complex securities, telecommunucations, or the Internet, for instance.

[18] *See, e.g.*, H.J. Res. 111, Pub. L. No. 115-74, 123 Stat. 1243 (2017) (providing for congressional disapproval, under the Congressional Review Act, of a CFPB rule relating to arbitration agreements); S.J. Res. 57, Pub. L. No. 115-73, 132 Stat. 1290 (May 21, 2018) (nullifying a CFPB rule relating to indirect auto lending and compliance with the Equal Credit Opportunity Act). *See generally* Congressional Research Service Report, *Congress's Authority to Influence and Control Executive Branch Agencies* (Dec. 19, 2018) (describing Congress's statutory and non-statutory tools to oversee and correct its

departs from proper procedure, courts can and do step in.[19] And even "independent" agencies are subject to considerable control by the president.[20] Of course, regulation's industry critics ground their attacks not upon the agencies' policy or procedural failures; rather, they complain of the proper operation of agencies *within* policy and procedural bounds—they are annoyed at being regulated. They resent that their private interests must yield to the public interest at all.

Opponents likewise argue that independent agencies limit or offend "individual liberty." *PHH Corp.*, 881 F.3d at 164, 174 (Kavanaugh, J., dissenting). We suppose that may be true in some warped sense. Independent regulatory watchdogs are purposed to limit the freedom of predatory corporations to defraud American consumers, of employers to engage in unfair labor practices against their workers, of businesses to combine and conspire against competition, and of plutocrats to flood our politics with unlimited money to capture and paralyze our democracy. But fundamentally, these

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administrative delegations, including but not limited to procedural controls on agency decisionmaking, funding, censure and contempt of congress, enforcement of civil subpoenas, and advice and consent).

[19] *See* 2 AM. Jur. 2d Admin. Law § 384 (2019) (explaining that "judicial review ensures that an essentially fair process is employed by an agency," as well as "compliance by administrative agencies with legislative policy as expressed by the language of the agency's enabling statute").

[20] *See* BRIANNE J. GOROD ET AL., CONSTITUTIONAL ACCOUNTABILITY CTR., CONSTITUTIONAL & ACCOUNTABLE: THE CONSUMER FINANCIAL PROTECTION BUREAU 28-34 (Oct. 2016).

agencies guard and ensure liberty—of individual Americans to live in safety, peace, and prosperity, free from such evils and externalities.

Routinely in our society "we accept limitations on our individual freedoms to gain greater freedom."[21] This greater freedom means "regulations that reduce smog, acid rain, ozone destruction, the use of DDT, backyard burning of garbage, driving while intoxicated, noise pollution—and more recently, exposure to secondhand smoke, injuries caused by not wearing seat belts, and texting while driving."[22] The freedom we gain from these regulations is "the freedom they provide from the tyranny of others' stupid decisions,"[23] and freedom from a tyranny of greed. Of course, to the regulated, regulation is indeed a constraint; but it's one that delivers freedoms the rest of us enjoy. As the saying goes, "your right to swing your arms ends just where the other man's nose begins."[24]

The CFPB and its independent structure reflect Congress's considered judgment that consumers' liberty interest to be free from predatory financial practices outweighs the predators' liberty interest to swing into the public's nose. They also reflect sincere and justified concern that this agency would be a

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[21] SHAWN OTTO, THE WAR ON SCIENCE 350 (Milkweed Eds. 2016).

[22] *Id.*

[23] *Id.*

[24] Zechariah Chafee, Jr., *Freedom of Speech in War Time*, 32 HARV. L. REV. 932, 957 (1919).

particular target of efforts at improper influence. Congress's design also fits neatly within the separation of powers and this Court's long-settled precedent. The Court should consider very carefully the consequences of dismantling that regulatory order at the behest of the predators, and on the back of a specious constitutional theory they contrived.

II. This Challenge Is The Product Of A Long-Term Effort By Regulated Industries To Hobble Independent Agencies.

Against this backdrop of decades of growth and safety under public-interest regulation, Petitioner and the Solicitor General advance an ahistorical "unitary executive" theory of Article II power. Notwithstanding efforts to ground this theory in the text and history of the Constitution, the "unitary executive" theory, as advanced here, is in reality the novel product of an ideological, industry-backed effort whose intent is to "dismantle[] the administrative state."[25]

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[25] Letter from Henry N. Butler to Federalist Society Board Member C. Boyden Gray (May 9, 2017), *in* ALLISON PIENTA, UPDATE TO REPORT ON "THE FEDERALIST SOCIETY'S TAKEOVER OF GEORGE MASON UNIVERSITY'S PUBLIC LAW SCHOOL" (Dec. 2018) (describing "purpose" of Gray's $1.5 million donation to Scalia Law School's Center for the Study of the Administrative State to "entice Neomi [Rao] to return home to Scalia Law after she dismantles the administrative state while serving at OIRA"); *see also* Mark Joseph Stern, *What the Koch Brothers' Money Buys*, SLATE (May 2, 2018); Luke Hartig, *Trump's Four-Pronged War on the Administrative State*, JUST SECURITY (Feb. 7, 2018).

The true roots of the modern "unitary executive" theory date not to the Founding Era but to the Reagan Administration. As recounted by Reagan Solicitor General Charles Fried, the "Reagan Revolution" was "fought on two fronts."[26] The first was an ideological, pro-corporate political front: limited government, aggressive deregulation, and tax cuts designed to "starve politicians of the resources with which they regulate the economy."[27] The second "was the legal front,"[28] on which Reagan's DOJ lawyers worked vigorously to develop doctrinal infrastructure to support the administration's antiregulatory agenda.

Central to that effort was the view that the "the President must be allowed a strong hand in governing the nation and providing leadership," which took rudimentary form as the "unitary executive" theory in a series of Reagan Era Office of Legal Counsel opinions and Presidential signing statements.[29] A driving force behind this effort was longtime Reagan deputy Edwin Meese, who, as Attorney General, arranged workshops and seminars on the "unitary executive." This indoctrination sought to ensure that those who did not come to the

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[26] CHARLES FRIED, ORDER AND LAW: ARGUING THE REAGAN REVOLUTION—A FIRSTHAND ACCOUNT 17 (1991).

[27] *Id.*

[28] *Id.*

[29] *Id.*; Amanda Hollis-Brusky, *Helping Ideas Have Consequences: Political and Intellectual Investment in the Unitary Executive Theory, 1981-2000*, 89 DENV. U. L. REV. 197, 202 (2011).

Department "committed to th[e] program" were ultimately "convinced."[30]

In a pair of cases concerning limitations on the President's removal powers, the Reagan Revolution's new, sweeping theory of executive power failed to gain purchase in this Court. At oral argument in *Bowsher v. Synar*, Justice O'Connor remarked that the Justice Department's "unitary executive" theory was "kind of a novel doctrine you're espousing, and I can't quite put a finger on that approach in any of this Court's previous decisions."[31] And in *Morrison v. Olson*, despite an adamantly pro-"unitary executive" decision below, this Court, in a majority opinion by Justice Rehnquist, reversed the D.C. Circuit to hold that the Independent Counsel Act at issue did not violate the separation of powers.

Only Justice Scalia's dissent in *Morrison* even mentioned the "unitary executive" by name. Indeed, that brief mention "represented the most direct and clear articulation of the UET ["unitary executive" theory] *qua* UET in Supreme Court doctrine before or since."[32] Justice Scalia's view failed to persuade even one other member of the Court. But even after *Morrison*'s rebuke on its "legal front," the Reagan

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[30] FRIED, *supra* note 26, at 158; *see also* JEFFERSON DECKER, THE OTHER RIGHTS REVOLUTION: CONSERVATIVE LAWYERS AND THE REMAKING OF AMERICAN GOVERNMENT 186 (2016) ("The appeal of the unitary executive came out of the Reagan administration's desire to consolidate power, but also out of its desire to deregulate.")

[31] Tr. of Oral Arg. at 52, *Bowsher v. Synar* 478 U.S. 714 (1986) (No. 85-1377).

[32] Hollis-Brusky, *supra* note 29, at 209.

DOJ pressed on, advising its lawyers in 1988 that the "'unitary [e]xecutive' principle of Article II" should be used to "question the viability of 'independent' agencies in their present form."[33]

One can understand why regulated interests chafe. But if they are allowed to succeed in limiting the independence of independent agencies, agencies will become easier to capture and bend to the interests of private influence, if not (as some no doubt wish) neutered altogether. Naturally, then, those interests have over decades mobilized their resources to advance their pet "unitary executive" theory. Justice Scalia's dissent in *Morrison* provided regulated interests the seed, and robust industry investment in the "unitary executive" theory has provided the fertilizer, for this theory's continued development well beyond the Reagan administration.

A primary vector of this work was, and to this day remains, the Federalist Society for Law and Public Policy Studies. Funded by powerful antiregulatory forces like the U.S. Chamber of Commerce and the Koch brothers, plus untold millions in anonymous donations, the Federalist Society and its network have long prioritized the mainstreaming of the "unitary executive" theory.[34]

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[33] U.S. DEP'T OF JUSTICE OFFICE OF LEGAL POLICY, THE CONSTITUTION IN THE YEAR 2000: CHOICES AHEAD IN CONSTITUTIONAL INTERPRETATION 180 (1988).

[34] *See generally* Hollis-Brusky, *supra* note 29; Ann Southworth, *Lawyers and the Conservative Counterrevolution*, 43 LAW & SOC. INQUIRY 1698 (2018). For a history of the construction by big, secretive special interests of the academic hothouse in which this "unitary executive" theory was grown and nurtured, see generally NANCY MACLEAN, DEMOCRACY IN

The Society's first conference during the George H.W. Bush administration, for example, featured an opening panel on "Agency Autonomy and the Unitary Executive," where D.C. Circuit Judge Laurence Silberman described his own invalidated opinion in *Morrison* as the "high water mark" of the "constitutional lost cause" of the "unitary executive" theory.[35]

But that cause has proven as persistent as a weed. Judge Silberman could not then have foreseen that for decades to come, the Federalist Society and its backers would invest vast financial and intellectual capital into advancing that "lost cause." The "unitary executive" theory "headlined or played

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CHAINS ch. 8, 11-12, Conclusion (2017). *See also id.* at xix, 152 ([T]he far-flung and purportedly separate, yet intricately connected, institutions funded by the Koch brothers and their now large network of fellow wealthy donors . . . empower a 'private governing elite' of corporate power freed from public accountability."). While the secrecy of this covert operation obscures one's view, all signs suggest that the same small corps of big interests is behind the construction of the hothouse, the propagation of this self-serving theory, the Federalist Society's judicial selection operation (and related Judicial Crisis Network political campaigns for nominees), and the abundance of *amicus* briefs with which the Court has been showered. *See* Robert O'Harrow Jr. & Shawn Boburg, *A Conservative Activist's Behind-the-Scenes Campaign to Remake the Nation's Courts*, WASH. POST (May 21, 2019). As we argue in footnote 43, because of the inadequacy of Supreme Court Rule 37.6, the Court, the public, and the parties all remain ignorant of who is really whom in this proceeding. Given the background of years of coordinated effort leading to this, true identities are particularly important to know, yet unavailable.

[35] *See* Laurence Silberman, *Panel I: Agency Autonomy and the Unitary Executive*, 68 WASH. U.L.Q. 495, 500 (1990).

a strong supporting role at three additional Federalist Society National Conferences between the end of the Reagan administration and the beginning of the George W. Bush administration."[36] And over the years, the Federalist Society would go on to devote countless conventions, keynote speeches, conference panels, blog posts, teleforums, and issue briefs[37] to the task of dismantling the administrative state by "put[ting] the final nail in the coffin"[38] of *Morrison v. Olson*.

So, decades later, that cause persists—now with renewed and well-funded influence following aggressive and successful efforts to reshape the composition of the federal courts in the Trump Era. In describing the Trump administration's efforts to nominate ideologically vetted Federalist Society members to the bench, former White House Counsel (and Federalist Society member) Donald McGahn put

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[36] Hollis-Brusky, *supra* note 29, at 219.

[37] *See, e.g.*, Videotape: The Great Dissent: Justice Scalia's Opinion in *Morrison v. Olson* (The Federalist Soc'y for L. & Pub. Policy broadcast Oct. 7, 2019); William W. Buzbee et. al., *Independent Agencies: How Independent is Too Independent?*, The Federalist Soc'y Nat'l Lawyers' Convention (Nov. 2018); Phillip A. Wallach, *Building Article I Conservatism*, The Federalist Soc'y Blog (Mar. 27, 2018) ("The Federalist Society['s] . . . promotion of original-meaning originalism and the concept of the unitary executive have been especially important."); Videotape: Is the CFPB Unconstitutional? (The Federalist Soc'y broadcast Dec. 8, 2016); *Deep Dive Episode 23 – En Banc D. C. Circuit Upholds CFPB Constitutionality*, THE REGULATORY TRANSPARENCY PROJECT (Feb. 5, 2018).

[38] Hon. Brett M. Kavanaugh, *Panel: Federal Courts and Public Policy*, American Enterprise Institute (Mar. 31, 2016).

it plainly: "There is a coherent plan here where actually the judicial selection and the deregulatory effort are really the flip side of the same coin."[39] By one accounting, this dual effort to shape the bench and the law is itself at least a $250 million enterprise, much of its funding coming from anonymous sources.[40]

As members of the Senate Judiciary Committee, we have seen the dark-money-funded politicization of the judicial nomination and confirmation process emerge, climb to top political priority, and pay remarkable dividends: The Federalist Society now counts 85 percent of the Trump administration's Supreme Court and circuit court nominees as members.[41]

In truth, this is not so much two "flip side[s]" of Mr. McGahn's "coin" as it is three legs of a stool: deregulation, judicial selection, and huge donor interests behind the persistent movement to evade and weaken regulation. This portends "agency capture" at a whole new level, extending beyond the writers of rules (legislators and regulators) to their ostensibly neutral interpreters (judges).

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[39] *See* Barnes & Mufson, *supra* note 16; *see also* Jason Zengerle, *How the Trump Administration is Remaking the Courts*, N.Y. TIMES (Aug. 22, 2018) (quoting McGahn's November 2017 speech to the Federalist Society, where he observed that "regulatory reform and judicial selection are so deeply connected.").

[40] O'Harrow & Boburg, *supra* note 34.

[41] Statistic on file with Sen. Whitehouse's office.

Symptomatic of this ambition are the scores of industry-funded *amicus* briefs now regularly flooding this Court. In this case, at least 13 *amici* in support of Petitioner receive financial support from the same entities that back the Federalist Society's efforts to bring the "unitary executive" theory into the mainstream of legal thought.[42] Many of these *amici* claim status as "social welfare" organizations to keep their donor lists private, and this Court's Rule 37.6 permits them to do so.[43] We document some of the common financial supporters of these *amici* in Appendix A.

These *amicus* briefs may appear to be a broad outpouring of support for a legal position, but publicly available information gleaned elsewhere suggests them to be an echo chamber funded by a small and powerful cabal of self-interested entities. We are all thus deprived of knowing how real or artificial this florescence of briefing is.[44]

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[42] *See* Appendix A.

[43] The Court, on its own behalf and for the sake of other parties and the public, ought to require the disclosure of who is really behind *amicus* briefs. Regrettably, the Court's disclosure rule for *amicus* briefs, Supreme Court Rule 37.6, is plainly inadequate to provide the Court the information it needs to assess potential conflicts. The public knows far too little about the dark-money *amici* present in this case. In the attached Appendix, we strive to provide the Court with some of the information an effective discosure rule would provide, however incomplete our available information may be. *See* Appendix A.

[44] *See, e.g.*, Mary Bottari, *Behind Janus: Documents Reveal Decade-Long Plot to Kill Public-Sector Unions*, IN THESE TIMES (Feb. 22, 2019) (showing how the Koch brothers-linked "donor advised funds" DonorsTrust and Donors Capital funded groups

* * * *

This Court's near-unanimous decision in *Morrison* has been undisturbed for over 30 years, its unanimous decision in *Humphrey's Executor* for over 80. Undermining those decisions now offends the bedrock principle of *stare decisis.*[45] But (to borrow some punchy language) like "some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried,"[46] attacks on these precedents grounded in the "unitary executive" theory persist.[47] And persist. And persist.

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that filed thirteen separate *amicus* briefs in *Janus v. Am. Fed'n of State, Cty., & Mun. Emps.*, 138 S.Ct. 2448 (2018)).

[45] Members of this Court have lamented the troubling cracks beginning to regularly show in this bedrock principle. As Justice Kagan observed, a majority of this Court has proven willing to overturn established precedents "for no exceptional or special reason, but because it never liked the decision . . . because it wanted to." *Janus*, 138 S. Ct. at 2501 (Kagan, J., dissenting). Dissenting against the Court's 5-4 abandonment of the 40-year-old precedent *Nevada v. Hall* last term, Justice Breyer put it plainly: "Today's decision can only cause one to wonder which cases the court will overrule next." *Franchise Tax Bd. v. Hyatt*, 139 S. Ct. 1485, 1506 (2019) (Breyer, J., dissenting). We note Justice Breyer's warning that it is "dangerous to overrule a decision only because five Members of a later Court come to agree with earlier dissenters on a difficult legal question." *Id.*

[46] *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384, 398 (1993) (Scalia, J., concurring).

[47] At the most recent Federalist Society National Convention, one notable proponent, U.S. Attorney General William Barr, proclaimed that the "unitary executive" theory is, in fact, "not a 'theory'" at all, but rather "what the Framers unquestionably did in Article II of the Constitution." U.S. Dep't

The big forces of influence behind agency capture, and behind the "unitary executive" theory, seek to reduce public-interest regulation's capacity to defend the public's health, safety, and welfare. It is the judiciary's role to police the integrity of public-interest regulation; to protect it against hasty misjudgments, slipshod procedure, improper influence, and outright capture. Were it to reverse course now and overturn its own precedent, the Court could well become, as Jefferson worried, a "citadel of the law" that has turned "its guns on those they were meant to defend."[48]

That outcome would undermine public confidence not only in the Executive and Legislature's ability to resist corporate influence, but in the Judiciary's independent role. We are not alone in this fear:

> Even if clothed in constitutional garb, judicial efforts to cut back on administrative governance will inevitably be seen in political terms, as part of an ongoing national struggle between conservatism and progressivism . . . . The Roberts Court separately has gained a reputation as a pro-business court, thereby reinforcing

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of Justice, *Attorney General William P. Barr Delivers the 19th Annual Barbara K. Olson Memorial Lecture at the Federalist Society's 2019 National Lawyers Convention* (Nov. 15, 2019). Unquestionably.

[48] Letter from Thomas Jefferson to John W. Eppes (May 28, 1807), *in* 10 WORKS OF THOMAS JEFFERSON 412-13 (Paul Leicester Ford ed. 1905).

> perceptions of it as antiregulatory. And it has been increasingly politically polarized, with the Justices divided into conservative and liberal blocs that overwhelmingly vote together in ideologically contentious cases . . . Put together, all of this might suggest that the Court risks long-lasting institutional harm were it to follow through on its anti-administrative rhetoric and significantly cut back the administrative state."[49]

Dodd-Frank and the creation of the CFPB came about in the wake of one of the worst financial crises in the nation's history. While Americans lost their homes in a massive foreclosure crisis, they saw Wall Street forces responsible for the crisis face no accountability.[50] Concern in the public and in Congress over the demonstrated force of industry influence was widespread and justified. *Amici* saw it firsthand. Congress was well within its rights to insulate the CFPB as it did from this well-documented industry influence.

This Court should not, under the guise of "liberty," and in defiance of both the Framers and settled precedent, impose an agency structure *more*

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[49] Gillian E. Metzger, *Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 69-72 (2017).

[50] Eamonn K. Moran, *Wall Street Meets Main Street: Understanding the Financial Crisis*, 13 N.C. BANKING INST. 5 (2009).

susceptible to corporate influence. Nor should it invalidate this critical agency, subjecting those defended by its proven expertise and track record to the whims of a malleable Congress. To do so would certainly be a "win" for big, regulated industries flush with cash and cadres of paid lobbyists. But for the public, it would be a devastating disservice.

CONCLUSION

For the foregoing reasons, the opinion of the Ninth Circuit should be affirmed.

Respectfully submitted,

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JANUARY 22, 2020

APPENDIX A

These *amicus* briefs may appear to be a broad outpouring of support for a legal position, but publicly available information gleaned elsewhere suggests them to be an echo chamber funded by a small and powerful cabal of self-interested entities:

	Donors Trust	The Lynde & Harry Bradley Foundation	Sarah Scaife Foundation	The Searle Freedom Trust	Charles Koch	FMKF F.M. Kirby Foundation	William H. Donner Foundation
Center for Constitutional Jurisprudence (Claremont Institute)	X	X	X	X			X
Pacific Legal Foundation	X		X	X			
Southeastern Legal Foundation	X	X	X				
National Federation of Independent Business Small Business Legal Center	X	X					
Washington Legal Foundation	X	X				X	
Cato Institute	X	X			X		
Landmark Legal Foundation	X	X	X			X	
New Civil Liberties Alliance	X	X	X	X	X		
Buckeye Institute	X			X			
Competitive Enterprise Institute (CEI)	X	X	X	X	X		X
The 60 Plus Association	X						

***Amicus* name**	**Sampling of industry-tied funders who also fund the Federalist Society[1]**
Center for Constitutional Jurisprudence (Claremont Institute)[2]	-Donner Foundation -DonorsTrust[3] -Lynde and Harry Bradley Foundation -Pierre and Enid Goodrich Foundation -Sarah Scaife Foundation -Searle Freedom Trust
Pacific Legal Foundation[4]	-Adolph Coors Foundation[5] -DonorsTrust

[1] *See 2017 Annual Report*, The Federalist Soc'y for L. & Pub. Policy Studies, 48-49 (Jan. 21, 2020 4:30 PM), https://fedsoc.org/commentary/publications/annual-report-2017. Each organization listed here gave $25,000 or more to the Federalist Society in 2017, the most recent year available on record. The Annual Report also notes that 26 anonymous donors gave $25,000 or more in that year; of those anonymous donors, 11 gave $100,000 or more.

[2] *Top Supporters of The Claremont Institute*, Conservative Transparency (Jan. 21, 2020 4:30 PM), http://conservativetransparency.org/top/adv/?recipient%5B%5D=812. The ConservativeTransparency database tabulates contributions from 1985 through 2014.

[3] Donors Trust is a 501(c)(3) "donor-advised fund" through which individuals and other tax-exempt entities can make anonymous charitable contributions and to organizations of their choice. Along with its 509(a)(3) supporting organization Donors Capital Fund, it has given out "over $1.1 billion to over 1,900 charities" since 1999. Donors Trust has received millions of dollars in donations from the Koch brothers and related organizations. *See DonorsTrust* (Jan. 21, 2020 4:30 PM), https://www.sourcewatch.org/index.php?title=DonorsTrust.

	-Dunn Foundation -Sarah Scaife Foundation -Searle Freedom Trust
Southeastern Legal Foundation[6]	-DonorsTrust -Lynde and Harry Bradley Foundation -Richard and Helen DeVos Foundation -Sarah Scaife Foundation
National Federation of Independent Business Small Business Legal Center[7]	-DonorsTrust -Lynde and Harry Bradley Foundation
Washington Legal Foundation [8]	-DonorsTrust -F.M. Kirby Foundation -Lynde and Harry Bradley

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[4] *Top Supporters of Pacific Legal Foundation*, Conservative Transparency (Jan. 21, 2020 4:30 PM), http://conservativetransparency.org/top/?recipient=881.

[5] Adolph Coors Foundation 2015 IRS Form 990, GuideStar (Jan. 21, 2020 4:30 PM), https://pdf.guidestar.org/PDF_Images/2016/510/172/2016-510172279-0d99d557-F.pdf.

[6] *Top Supporters of Southeastern Legal Foundation*, Conservative Transparency (Jan 21, 2020 4:40 PM), http://conservativetransparency.org/top/?recip ient=1450.

[7] JANE MAYER, DARK MONEY: THE HIDDEN HISTORY OF THE BILLIONAIRES BEHIND THE RISE OF THE RADICAL RIGHT 518 (2016).

[8] *Top Supporters of Washington Legal Foundation*, Conservative Transparency (Jan. 21, 2020 4:40 PM), http://conservativetransparency.org/top/adv/?recipient%5B%5D=29138.

	Foundation
Cato Institute[9]	-Charles Koch Foundation -DonorsTrust -Dunn Foundation -Lynde and Harry Bradley Foundation -Sarah Scaife Foundation
Landmark Legal Foundation[10]	-DonorsTrust -F.M. Kirby Foundation -Lynde and Harry Bradley Foundation -Sarah Scaife Foundation
New Civil Liberties Alliance	-Charles Koch Foundation[11] -DonorsTrust[12] -Lynde and Harry Bradley Foundation[13] -Sarah Scaife Foundation[14]

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[9] *Top Supporters of Cato Institute*, Conservative Transparency (Jan. 21, 2020 4:40 PM), http://conservativetransparency.org/top/adv/?recipient%5B%5D=887.

[10] *Top Supporters of Landmark Legal Foundation*, Conservative Transparency (Jan. 21, 2020 4:40 PM), http://conservativetransparency.org/top/?recipient=29123.

[11] Charles Koch Foundation 2018 IRS Form 990, BKD LLP (Jan. 21, 2020 4:50 PM) https://mk0bahufale3skgkthdo.kinstacdn.com/wp-content/uploads/2019/11/990-CKF-2018.pdf.

[12] *See, e.g.*, DonorsTrust 2018 IRS Form 990, p.66.

[13] *2018 Year In Review*, The Lynde and Harry Bradley Foundation, 9 (Jan. 21, 2020 4:55 PM), https://cdn2.hubspot.net/hubfs/4152914/2018_YearReview_BradleyFdn.pdf (donation marked “[t]o support projects related to constraining the Administrative State”).

Buckeye Institute[15]	-DonorsTrust -Searle Freedom Trust
Center for the Rule of Law	-Received a large anonymous donation routed through Judicial Education Network, a 501(c)3 administered by Federalist Society board co-chairman Leonard Leo.[16]
Competitive Enterprise Institute (CEI)[17]	-Charles Koch Foundation -Donner Foundation -DonorsTrust[18] -Lynde and Harry Bradley Foundation -Sarah Scaife Foundation -Searle Freedom Trust
The 60 Plus	-DonorsTrust

[14] *2018 Annual Report*, Sarah Scaife Foundation (Jan. 21, 2020 4:55 PM), http://www.scaife.com/2018_Sarah%20Scaife%20Foundation_Annual%20Report.pdf

[15] *Top Supporters of Buckeye Institute*, Conservative Transparency (Jan. 21, 2020 5:00 PM), http://conservativetransparency.org/top/adv/?recipient%5B%5D=3208; *see also* DonorsTrust 2018 IRS Form 990 for 2018, p. 45.

[16] Lachlan Markay, *Conservative Legal Pundit Was Secretly on Pro-Trump Group's Payroll*, The Daily Beast (Jan. 21, 2020 5:00 PM), https://www.thedailybeast.com/conservative-legal-pundit-was-secretly-on-pro-trump-groups-payroll.

[17] *35th Anniversary Dinner and Reception*, Competitive Enterprise Inst. (Jan. 21, 2020 5:05 PM), https://web.archive.org/web/20190710182657/https://int.nyt.com/data/documenthelper/1366-cei-gala-program/1438e537f20a04a672f6/optimized/full.pdf.

[18] *See, e.g.*, DonorsTrust 2018 IRS Form 990, p. 56.

Association[19]	
Chamber of Commerce of the United States of America	-The Chamber is a direct contributor to the Federalist Society.[20]

[19] *60 Plus Association*, Issue One (Jan. 21, 2020 5:06 PM), https://www.issueone.org/dark-money-groups-60-plus-association/.

[20] The Federalist Soc'y Annual Report 2017, *supra* note 1.